

CRUISE SHIP OPERATORS, THEIR PASSENGERS, AUSTRALIAN CONSUMER LAW AND CIVIL LIABILITY ACTS

PART TWO

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This paper is the second of two papers. Part One² outlined the common law duty to exercise reasonable care for passenger safety. It set out the basic provisions and history of the *Trade Practices Act* ('TPA')/*Australian Consumer Law* and the *Civil Liability Act* ('CLA') reforms insofar as they relate to personal injury claims arising out of breach of contract. In particular, Part One considered the extent to which the TPA/Consumer law 'picks up and applies' the state laws 'as surrogate federal law'. Of particular interest to ship operators, it also considered the extraterritorial application of Australian law.

Much of Part One lays the groundwork for the discussion that will take place in Part Two. It is here that the particular issues faced in dealing with a passenger's claim for personal injury in Australia will be canvassed. The purpose of Part Two is to consider the potential interaction of the various statutes by considering questions likely to be posed by the lawyers for either the passenger or the cruise ship operator in assessing a claim. Therefore this part will deal with the following questions:

- Will the CLA quantum limits apply to statutory guarantee claims?
- Will the CLA changes to tests of liability apply to statutory guarantee claims?
- Will the CLA provisions on risk warnings apply to statutory guarantee claims?
- Can the CLA provisions allowing exclusion of liability for recreational activities be relied upon to excuse liability in statutory guarantee claims?
- When can a corporation rely upon a contractual exclusion/limitation clause to exclude liability arising under a statutory guarantee?

The interplay between the Commonwealth and State provisions is a key issue here. It is important to bear in mind some key points that were covered in Part One; namely that:

- Corporations will be caught by the Commonwealth laws if contracting in Australia or in circumstances where chosen governing law or the objective proper law is that of an Australian State or territory, no matter where the cruise takes place.
- There may be territorial restrictions on the operation of the CLAs. *Insight Vacations*³ tells us that the NSW CLA provisions dealing with recreational services do not apply to services provided wholly outside NSW because the Act contains no expression of extraterritorial application. The courts are yet to determine whether the remainder of the CLA, or indeed the CLAs of other States, are similarly afflicted.
- The CLAs differ in wording State by State, which means that a decision of a court in one State concerning a wording from a different State's CLA must be treated with caution.
- The wording of s 275 (formerly s 74(2A)) is extremely important in determining which of the State CLA provisions – or indeed any of their laws generally – will be regarded as 'surrogate federal law.' This is not yet settled.
- It is at least arguable that a State law not falling within the narrow wording of CCA s 275 can be applicable by reason of the *Judiciary Act 1903* (Cth) ss 79 or 80; but only if it is not inconsistent with Commonwealth law. Further, there may be difficulties in applying the State CLAs to harm occasioned outside Australia.

For the purposes of this discussion, we will assume that the cruise operator is a corporation and that the proper law of the contract is that of an Australian State or territory. By reason of s 131 CCA, that corporation is therefore caught by the Commonwealth iteration of the *Consumer Law* found as a schedule to the CCA. That, in turn, means that s 275 *Consumer Law* applies.

¹ Sincere thanks Paul Myburgh for his comments and suggestions on a draft of this paper. Any errors are of course my own.

² (2015) 29 ANZ Mar LJ 93.

³ *Insight Vacations Pty Ltd v Young* [2011] HCA 16.

1 If a passenger establishes a corporation has breached the statutory guarantee leading to personal injury, will the applicable State CLA reform award quantum limits apply?

Once *Consumer Law* sections 275 (a) and (b) are satisfied, the short answer to this question is yes.⁴ The award quantum provisions⁵ fall squarely within the ambit of s 275. State laws concerning quantum ‘limit and preclude... recovery...’. They apply to ‘liability for breach of a term of the contract’ because the laws apply to awards of personal injury damages, ‘regardless of whether the claim is brought in tort, contract, under statute or otherwise.’⁶ The assessment of damages in various cases has proceeded on this basis.⁷

However there has been little discussion as to whether the CLA should apply to assess damages where the injury was sustained overseas. In the context of the recreational activities aspects of the CLA, the High Court in *Insight Vacations*⁸ did not need to explicitly deal with whether the quantum provisions of the CLA would have applied to the assessment of Mrs Young’s claim, because the parties had accepted from the outset that that was the case.⁹ But the extraterritorial application of the CLA (NSW) was discussed by the court. The High Court considered whether the recreational activity provisions could apply where the activity occurred outside NSW in any event. The court pointed out that this required analysis of the particular CLA.¹⁰ The CLA (NSW) made no provision for extraterritorial operation. The joint judgment of the court said:

The *Civil Liability Act* [NSW] made no express provision for any extra-territorial operation. It made no provision which dealt directly with whether the Act’s provisions were to apply to claims for breach of a contract whose proper law was not the law of New South Wales or to other claims where the application of choice of law rules would result in the *lex causae* being a law other than that of New South Wales. It may be—it is not possible to be certain—that the unstated assumption of the provisions was that, because all kinds of claims, however based, were treated as if they were species of a claim for a tort of negligence, the Act would apply to cases in which New South Wales would be the *lex causae* because it was the *lex loci delicti*. Or it may be that the unstated assumption was that the provisions would apply to any claim for negligence that was brought in any of the courts of New South Wales. It is neither possible nor profitable to explore those questions further.¹¹

The definition of ‘recreational activity’ talked of activity at a ‘beach, park or other public open space’. After a lengthy discussion, the Court decided there was ‘no reason to read those references to place as extending beyond places in New South Wales.’¹² The High Court was considering the extent to which the NSW CLA provisions constricted the consumer protection provided for in the *Consumer Law*. Given the intent of the *Consumer Law* and its status as Federal legislation, it therefore makes sense that the CLA provisions were not interpreted expansively. But will the same reasoning apply to different parts of the CLA not so fixated on ‘place’ such as that dealing with assessment of damages? That is relevant to determine whether an Australian court should apply the CLA quantum provisions where the incident occurred overseas.

General principles of conflicts law will also come into play. They are generally outside the scope of this paper so only a brief comment will be made.

For contract claims, the relevant choice of law clause, an implied choice of law or the objective proper law of the contract, will dictate how the damages are to be assessed. If the choice of law is a foreign law, but the objective proper law is Australian, it may be overridden by the *Consumer Law*,¹³ which in turn ‘uplifts’ the State CLA legislation. However, if the objective proper law is not Australian, an Australian court will need to scrutinise the terms, object and purpose of the CLA to determine if it should apply regardless. The court might consider the

⁴ We are assuming that the accident took place after the enactment of the predecessor of s 275, s 74(2A) TPA, in 2004. See *Nair-Smith v Perisher Blue Pty Ltd* [2013] NSWSC 727, [121].

⁵ See, eg, *Civil Liability Act 2002* (WA), Part 2; *Civil Liability Act 2002* (NSW), Part 2.

⁶ See, eg, *Civil Liability Act 2002* (NSW), s 11A.

⁷ *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641, 643 (Spigelman CJ); *Nair-Smith v Perisher Blue Pty Ltd* [2013] NSWSC 727, [121] where the judge held that the CLA did not apply because s 74(2A) was not operational at the time of the accident, but in *Nair-Smith v Perisher Blue Pty Ltd (No 2)* [2013] NSWSC 1463 the judge otherwise accepted the limitations on damages from the CLA would have applied: [5].

⁸ *Insight Vacations Pty Ltd v Young* [2011] HCA 16.

⁹ [2009] NSWDC 122, [32].

¹⁰ South Australia’s CLA, for example, expressly states that their provisions apply to claims brought in the State, no matter where the harm was suffered.

¹¹ At [16].

¹² At [35].

¹³ TPA, s 67; *Consumer Law*, s 67.

extent to which the CLA permits a contractual opt-out,¹⁴ delineates its scope of application or conversely, whether the CLA will override any such choice of law such that the CLA quantum limits apply. Whether the policy behind the CLA changes is served by their application to contractual claims under foreign law is a moot point.

As for tort claims, in *John Pfeiffer v Rogerson*, the High Court ruled that ‘questions about kinds of damage, or amount of damages that may be recovered would... be treated as substantive issues governed by the *lex loci delicti*’.¹⁵ The High Court extended this to foreign torts in *Regie National Des Usines Renault SA v Zhang (Zhang)*.¹⁶ Therefore if the tort has occurred overseas, the plaintiff may argue that *Zhang* means a court must apply foreign law to determine the quantum of damages, and not the CLA. Faced with such an argument, again, the court will need to discern whether the CLA legislation – by its terms, or by divining its purpose and intent – ought to apply regardless.

On a practical level, if it is asserted that foreign law applies, the effect of that foreign law must be proven in court. Unless a party persuades the court that the law of that jurisdiction is the applicable law and leads evidence of the effect of that law, then the court will be required to adopt the default rule. That rule is even if foreign law applies, if no evidence is led of its effect, it is assumed to be of the same effect as the law of the forum.¹⁷ A pragmatic solution at the best of times, it becomes positively fractured in the new reality of 7 different systems of tort law within Australia. In some states, the ‘law of the forum’ applicable by default might be argued to be purely common law (in a state in which the CLA has no extraterritorial applicability), and in others, it might be argued that it is assessment modified by the CLA statute (if the CLA does have extraterritorial applicability, like SA).

There is clearly a significant problem with the application of the CLAs in cases concerning events that have occurred overseas. That problem is of particular relevance to passenger claims.

2 Will the CLA provisions altering tests that establish or modify liability apply to statutory guarantee claims?

This issue is not straightforward, although some recent case law is insightful. The CLAs seek to apply to any action for personal injury, whether brought in contract, tort or based on statute.¹⁸

As highlighted by the judgment of the High Court in *Insight*, the context of the statutory guarantees within the *Consumer Law* (then TPA) is important. Section 64 of the *Consumer Law* renders void a term of a contract that purports to ‘exclude restrict or modify the application of, the exercise of a right by, or any liability for breach’ of a term/guarantee imposed by the *Consumer Law*.¹⁹ There are only narrow exceptions to s 64. Relevantly, they are s 139A CCA which relates to recreational services (discussed below) and s 275, which allows State laws that modify or limit liability to continue to operate in stipulated circumstances.

Section 275 expressly uplifts State laws that apply to modify liability once a defendant has been found to be liable. This would mean laws relating to, for example, contributory negligence²⁰ and proportionate liability would be clearly capable of uplift to apply to claims for breach of the statutory guarantee.

But what about provisions that recast the duty, such as s 5B and s 5C CLA (NSW)?

As outlined above, there appear to be at least two alternative paths by which the CLA provisions regarding liability can apply to statutory guarantee claims brought under the Commonwealth iteration of the *Consumer Law*.

1. The first path is when the CLA reform can satisfy s 275 CCA. If s 275 CCA is satisfied then the State law becomes surrogate federal law. Any inconsistency will be dealt with by construction rather than by application of s 109 of the *Constitution*.
2. The second is by reliance on ss 79 or 80 of the *Judiciary Act 1903* (Cth). It must be stressed that the *Judiciary Act* path is only available where the State law is not inconsistent with the federal law.

¹⁴ Some CLAs do permit a contractual ‘opt out’, but generally not in relation to quantum calculations. An interesting question is whether a passage contract incorporating the Athens Convention might be considered an ‘opt-out’ clause.

¹⁵ (2000) 203 CLR 503, [100].

¹⁶ [2002] 187 ALR 1.

¹⁷ Martin Davies, Andrew Bell and Paul Brereton, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 8th ed, 2010) [17.37].

¹⁸ See, eg, CLA (NSW), s 5A.

¹⁹ *Insight*.

²⁰ As was decided in *Motorcycling*, see [176].

Therefore, any CLA provision upon which a party relies must, to the extent it undermines the protection offered by the *Consumer Law*, satisfy s 275. Section 275 is only triggered once there has been ‘a failure to comply with a guarantee that applies to a supply of services’. A majority of the NSW Court of appeal has held that, in effect, the trigger for the operation of the section is a pre-existing liability that has accrued under the CCA provision for a breach of the guarantee.²¹ As the cases discussed below will show, there has been some judicial disagreement as to the extent that contractual liability can be ‘unpicked’ and recast using the CLA tests.²²

The case of *Motorcycling Events Group Australia Pty Ltd v Kelly*²³ is instructive. In that case the plaintiff alleged there was a breach of s 74 TPA that had given rise to personal injury. The NSW Court of Appeal decided that s 74(2A) TPA did not pick up the State CLA provisions that provided the test for a breach of duty of care (s 5B), or negated the existence of that duty where a risk warning had been provided (s 5M).²⁴ The court was open however to the use of ss 79 and 80 of the *Judiciary Act* as a means to uplift the CLA provisions into a claim for breach of s 74. The *Judiciary Act* provisions were relevant because the court was exercising Federal jurisdiction in determining the *Trade Practices Act* claim. Those provisions would not work for a provision that negated the duty (s 5M) as that provision was directly inconsistent with s 74.²⁵

Gleeson JA delivered the lead judgement for the majority. His Honour decided that because the due care and skill obligation in s 74 was not a statutory civil cause of action, and it did not outline a code regarding the standard of conduct required, then the common law had to ‘fill the gaps’. The court held that pursuant to s 80 of the *Judiciary Act*, the common law to be applied was the common law of Australia *as modified by the statute law in force in the State of New South Wales* [emphasis added].²⁶ Ss 5B and 5C were held not inconsistent with the implied warranty in s 74(1). Thus ss 5B and 5C were applied to determine liability pursuant to s 74.²⁷

The Gleeson approach would require parties to carefully analyse the particular provisions of the CLA that may not be captured by the particular words of s 74 (2) but might nevertheless be ‘rescued’ by s 79 or 80 of the *Judiciary Act 1903*. The secondary option of using s 79 or s 80 *Judiciary Act* to ‘fill the gaps’ adds to the complexity of advising either party as to the likely outcome of a dispute.

The approach of Gleeson JA awaits the imprimatur of the High Court. Further, it may well be that the Gleeson approach is not available under the new statutory guarantees, because they are now a statutory civil cause of action the remedy for which is now found within the ACL not at common law.

In any event, is it even possible to apply the CLA to determine contractual liability where the injury was sustained outside the territory of Australia? As we have seen above, there is some uncertainty regarding the extra-territorial reach of the CLA in respect of tort-based claims, and the High Court in *Insight Vacations* made it clear that the waiver provisions relating to recreational services as contained in the NSW CLA could not apply to services wholly supplied outside NSW. The same issue may affect the other provisions of the CLA, in the sense that courts may be unwilling to subject contracts governed by NSW law to the liability regime in the CLA where the relevant parties are foreigners, the injury was sustained overseas and the consequences of the injury will not be felt in Australia. This will depend on the mechanism each State uses to determine the application of its CLA, any statement of extraterritorial application, and judicial interpretation of the policy considerations surrounding the CLA. Again, the outcome of this issue may well vary between States.²⁸

²¹ See *Insight*, per Sackville AJA at [144] – [146]; Basten JA [91]. Spigelman CJ dissented on this point [30] – [46]; [55]. (the unreported version of the judgment must be consulted to find this discussion; inexplicably, it was omitted from the report of the case in the NSWLR). The High Court generally affirmed the majority view on appeal although did not need to decide whether s 74(2A) TPA would pick up laws that modify or extinguish the duty imposed by s 74.

²² As noted by Beech-Jones J in *Nair Smith v Perisher Blue Pty Ltd (No 2)* [2013] NSWSC 1463, ‘if Pt 1A [of the CLA NSW] applies to claims for a breach of the term implied by s 74(1) then it would effectively rewrite the term.’ That case was decided on the basis that that s 74(2A) had not been enacted at the time of the plaintiff’s accident and therefore was not applicable. Absent s 74(2A), his Honour was prepared to hold that Part 1A of the CLA was inapplicable to actions for the breach of s 74(1) by the operation of s 109 of the *Constitution*, consistent with *Wallis v Downard Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388. For another discussion see the NSW Court of Appeal decision in *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137.

²³ [2013] NSWCA 361; 303 ALR 583. The leading judgment was delivered by Gleeson JA.

²⁴ Ss 5B and 5M were the particular provisions in question in this case.

²⁵ The appellant had not raised this argument, knowing it would be met by s 109 *Constitution – Motorcycling*, [142] (Gleeson JA).

²⁶ [147] per Gleeson JA, with whom JJA Maegher and Basten agreed.

²⁷ But s 5M was not. See the discussion below under 3.3 ‘no duty’ provisions.

²⁸ Here we are talking of contractual liabilities under the *Consumer Law*. If the claim is brought purely in tort, it could be argued that the law of the place of the tort is applicable to decide liability. A passenger seeking to rely upon the laws of another country would need to bring evidence of those laws, failing which the court will assume the laws are the same as the State of Australia in which proceedings are brought.

3 Will the 'no duty' provisions of the CLA apply to statutory guarantee claims?

The CLAs contain a number of provisions that remove the duty of care in a given situation. For example, in NSW and WA, the reforms provide that there is no duty of care:

- For recreational activities where there is a risk warning that complies with the requirements set out;²⁹ or
- To warn of an obvious risk.³⁰

Do these provisions satisfy s 275 such that they are surrogate federal laws that can then apply to statutory guarantee claims?

In *Insight* the High Court held that s 74(2A), the precursor to s 275, 'should not be construed as picking up and applying as a surrogate federal law a provision... which in its terms does not limit or preclude liability for breach of contract.'³¹ (emphasis added)

By its terms, s 275 will only uplift and apply as surrogate federal law if there has been 'a failure to comply with a guarantee that applies to a supply of services.' This was implicitly acknowledged by the High Court in *Insight*, when the Court noted that as a 'consequence of the satisfaction of those conditions' in (a) and (b), s 74(2A) could be enlivened.

The question was also discussed in *Motorcycling Events*. The defendant claimed that a risk warning had been given to the plaintiff prior to the motorcycling activity, and sought to rely upon s 5M of the CLA (NSW) to negate the duty and therefore no liability ensued. The defendant argued that s 5M was applicable to the defendant's claim because it satisfied s 74(2A), and was therefore an exception to s 68 that would otherwise have the effect of rendering the contractual provision void.

JA Gleeson considered whether s 5M CLA (no duty of care for recreational activity where risk warning) fell within the criteria of s 74(A) TPA. His Honour pointed to the significance of the two conditions in s 74(2A). Section 5M purported to negate the very existence of the statutory warranty contained in s 74(1). Yet the language of s 74(2A) appeared 'to require the existence of the implied warranty, and its breach, before the provision applies a State law'.³² The question, his Honour surmised, was 'whether s 74(2A) may operate to pick up and apply a State law which purports to negate the very existence of the statutory warranty in s 74(1)'. His Honour concluded that it would not, in so doing approving the obiter comments by both Sackville JA and Basten JA of the NSW Court of Appeal in *Insight*.³³ Section 5M therefore failed to meet the description given in s 74(2A). It did not limit or purport to limit or preclude liability for breach of a term. Nor could there could it be argued that s 5M CLA would negate the implied warranty of the TPA. That would raise a direct inconsistency argument under s 109 of the *Constitution*.³⁴ As a result, the court held that those provisions of the CLA³⁵ that seek to extinguish the existence of a duty in the first place cannot be relied upon by a Defendant in response to a claim for breach of s 74 TPA. There is no obvious reason why that conclusion would be different under the *Consumer Law*.

The recent case of *Alameddine v Glenworth Valley Horse Riding Pty Ltd*³⁶ is also illuminating. The NSW Court of Appeal confirmed its decision in *Motorcycling* that s 5M (no **duty** of care for recreational services where risk warning) falls outside the operation of s 275.³⁷ However s 5L (no **liability** for harm suffered from obvious risks of dangerous recreational activities) was found by the court to be of a type of provision able to be 'picked up and applied' by s 275. Section 5L purports, of itself, to exclude liability of the defendant.³⁸ Although obiter, these are important comments.

The reasoning of the NSW Court of Appeal in *Motorcycling* and *Alameddine*, and the majority of the NSW Court of Appeal in *Insight* awaits the scrutiny of the High Court. When a CLA provision is taken in isolation, the reasoning appears sound. However, it will lead to different results for related provisions that happen to use a

²⁹ CLA (NSW), s 5M; CLA (WA), s 5 I.

³⁰ CLA (NSW), s 5H; CLA (WA), s 5O.

³¹ At [26].

³² At [93].

³³ *Motorcycling*, [93].

³⁴ *Motorcycling*, [98].

³⁵ The same fate would apply to any State laws with the same wording.

³⁶ [2015] NSWCA 219.

³⁷ [2015] NSWCA 219, [63].

³⁸ *Ibid*.

different drafting device. For example, a provision under the title ‘Assumption of Risk’ provides that ‘[a] person is not liable in negligence for harm suffered by another person as a result of a materialisation of an inherent risk.’³⁹ On the reasoning of *Motorcycling* and *Alameddine*, this provision would appear to satisfy s 275. It purports to extinguish liability, not the existence of the duty, and could therefore be relied upon in defence of a claim based on s 60. Did the drafters consider there to be any significant difference between the expressions ‘no liability’ and ‘no duty’? In essence, both have the effect of relieving the defendant of the obligation to compensate.

If one adopts the Gleeson methodology, the extent to which the CLA provisions will apply to federal statutory guarantees would lead to a patchwork of applicable and inapplicable provisions in a cruise ship passenger claim based on s 60 ACL. That in itself is undesirable. The law is rendered uncertain, there is a risk the result will turn on questions of form rather than substance, and there is the possibility of different outcomes in different States if provisions of similar effect have been drafted with different wordings.

This area is ripe for legislative reform; in the meantime, we must await a ruling from the High Court.

4 Can a corporation rely upon their contractual exclusions that comply with the State CLA provisions to exclude liability under a statutory guarantee?

To the extent that the Commonwealth *Consumer Law* applies, in the *Insight* case the High Court answered this definitively in the negative. In that case an exclusion clause was contained in the contract which was to be wholly performed outside New South Wales. The service provider alleged that it was permitted to rely upon the exception clause because it was a permitted exclusion under the NSW iteration of the CLA, and that the CLA provisions were ‘surrogate federal laws’ under s 74 (2A) TPA.

In *Insight* the High Court confirmed that the operation of s 74(2A) was to ‘pick up and apply State laws that fit the description given in that subsection as surrogate federal laws; namely, those that ‘apply to limit or preclude liability for breach, and recovery’.⁴⁰ However, the High Court found that that did not include the provision that simply permits contractual exclusion of liability for recreational services, namely s 5N CLA (NSW). Section 5N was not itself a provision that limited or precluded liability and did not satisfy s 74(2A). In any event, s 5N did not have extraterritorial application.

As a result, s 5N and its equivalents in other States cannot be relied upon by incorporated⁴¹ recreational service providers to legitimise the use of contractual waivers where the proper law of their contract is a State in Australia.⁴² If there was an exclusion/limitation clause, to be valid it needs to fall within the permissive provision ‘built in’ to the CCA, namely s 139A.⁴³ Unless and until Federal Parliament amends s 275 *Consumer Law*, corporations cannot rely upon the provisions in State CLAs to permit the contractual waiver of liability for injuries sustained during the provision of recreational services.⁴⁴

In unusual circumstances it might be possible for the State CLA to apply. If a passenger from Australia sues in relation to a contract that does not have as its proper law the law of a State in Australia⁴⁵ then the Commonwealth *Consumer Law* will not apply. Accordingly, the relevance of s 64 and s 275 drops away. The State laws, both CLA and the mirroring *Consumer Law*, would need to be examined to see which of them would apply to the contract in question.⁴⁶ However, the CLA in that State may not have the requisite extraterritorial application.⁴⁷

³⁹ CLA NSW, s 5 I.

⁴⁰ *Insight* (HCA), [12].

⁴¹ CCA, s 131.

⁴² S 67 TPA and s 67 CCA mean that the Commonwealth iteration will apply.

⁴³ Formerly s 68B. Although the section numbers and terminology (warranty – guarantee) are different to those scrutinised by the High Court, it is submitted that the position regarding s 5N remains the same.

⁴⁴ Ss 79 and 80 of the *Judiciary Act 1903* (Cth) cannot apply because the State provisions are inconsistent with the Commonwealth.

⁴⁵ For example, on the facts of *Oceanic Sun Line v Fay* (1988) 79 ALR 9, several members of the High Court commented in obiter that the proper law of the contract could well have been Greek law.

⁴⁶ As an aside, in 2010, New South Wales amended the *Consumer Law* provisions contained in its *Fair Trading Act 1987* (NSW) so as to provide that s 5N CLA will apply to the consumer law enacted in NSW. By doing so, NSW has grafted its own broader recreational waiver provisions onto the supposedly uniform *Consumer Law*. (While this amendment occurred after the *Insight* ruling in the High Court, the legislature in NSW did not take the opportunity to elaborate on the extraterritorial application of s 5N). Section 88A reads:

88A Relationship with certain provisions of other Acts

(1) Section 64 (Guarantees not to be excluded etc. by contract) of the *Australian Consumer Law* is, with respect to a term of a contract for the supply of recreation services within the meaning of section 5N of the Civil Liability Act 2002, subject to that section of that Act.

⁴⁷ As the High Court decided in *insight Vacations v Young* as regards the CLA (NSW).

5 When can a corporation rely upon a contractual exclusion/limitation clause to exclude liability arising under a statutory guarantee implied by the Consumer Law?

If a consumer enters a contract for services with a corporation then it is the Commonwealth version of the statutory guarantee regime found in the *Consumer Law*, and the *Commonwealth Consumer and Competition Act* (CCA) that applies to the transaction.⁴⁸

In order to ensure the consumer benefits from the guarantee it is imperative that the supplier not be able to avoid its statutory responsibilities. Therefore the CCA, like the TPA before it, contains ‘general avoiding provisions’⁴⁹ which render void a contractual term that attempts to negate the benefits of the statutory guarantees imposed by the *Consumer Law* – s 64.⁵⁰ The CCA goes on to outline exceptions to the general avoidance provision; situations where the contractual provisions that would otherwise be rendered void will be allowed to take effect. In summary, for corporations there are now only two methods by which a contract term is permitted to ameliorate the full effect of s 64.⁵¹

- Certain types of limitation of liability will be allowed where the goods or services are not of a kind ordinarily acquired for personal, domestic or household use or consumption.⁵² This will not capture passenger contracts. Even if a cruise is undertaken for business, such as a conference, it is still of a kind *ordinarily* acquired for personal domestic or household use.
- the avoiding effect of s 64 is qualified for certain terms of a contract for the supply of ‘recreational services’ – s 139 CCA. This provision defines recreational services and spells out the extent to which an exclusion or limitation is protected from avoidance under s 64. As the High Court noted in *Insight*, the definition of ‘recreational services’ is narrower than its definition in the *Civil Liability Acts*.⁵³ But it will permit exclusion of liability for injuries sustained during recreational services that involve a sporting activity or one with a significant degree of physical exertion or physical risk.

The third possible method was eviscerated by the High Court in *Insight*.⁵⁴ That involved harnessing the permissive provisions of the State CLAs which allowed providers to exclude or limit liability for recreational activities. The argument relied upon s 74(2A) (now s 275) to uplift State and territory laws precluding liability or limiting quantum as surrogate laws applicable to, inter alia, due care and skill claims. The High Court said that s 74(2A) was engaged only by State laws that have the effect of limiting liability, not where those laws simply permit contractual exclusions. Reliance on those State laws would lead to an argument they are invalid to the extent they are inconsistent with s 74(2A) TPA/275 CCA.⁵⁵

Therefore, for passenger carriage contracts to which Australian law applies, the provider may only rely upon an exclusory term that satisfies the ‘recreational services’ provision of s 139A of the CCA. Any such term that falls outside this provision will be void under s 64. Significantly, it is submitted that s 64 will render void a clause that imposes any limits on passenger claims for maritime accidents or resulting from hotel type risks. In particular, it will render void a general limitation seeking to incorporate the *2002 Athens Convention*⁵⁶ quantum limits.

⁴⁸ CCA, s 131.

⁴⁹ High Court in *Insight*, [24].

⁵⁰ Quoted in Part One.

⁵¹ A non-incorporated service provider not otherwise captured by the CCA will have to consider the State provisions of the *Consumer Law*.

⁵² To be effective the provision must comply with the terms of s 64A. in relation to services the limit must be supplying services again or payment of the cost of supplying services again. The provision is subject to a ‘fair and reasonable’ threshold (sub-s 3) and the court is given guidance in assessing what will be fair and reasonable (sub-s 4). This provision will only apply where goods/services are of a kind not ordinarily acquired for personal domestic or household use. Even if a cruise is undertaken for business, such as a conference, it is still of a kind *ordinarily* acquired for personal domestic or household use.

⁵³ *Insight*, [25].

⁵⁴ In so doing, the High Court affirmed the majority of the NSW Court of Appeal and rejected the strong dissent of Spigelman CJ on this point.

⁵⁵ *Insight*, [26].

⁵⁶ *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea*, 1974, 1463 UNTS 19.

Section 139A is set out in Part 1 but bears repeating here:

CCA, s 139A Terms excluding consumer guarantees from supplies of recreational services

- (1) A term of a contract for the supply of recreational services to a consumer by a person is not void under section 64 of the Australian Consumer Law only because the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:
 - (a) the application of all or any of the provisions of Subdivision B of Division 1 of Part 3-2 of the Australian Consumer Law; or
 - (b) the exercise of a right conferred by such a provision; or
 - (c) any liability of the person for a failure to comply with a guarantee that applies under that Subdivision to the supply.
- (2) Recreational services are services that consist of participation in:
 - (a) a sporting activity or a similar leisure time pursuit; or
 - (b) any other activity that:
 - (i) involves a significant degree of physical exertion or physical risk; and
 - (ii) is undertaken for the purposes of recreation, enjoyment or leisure.
- (3) This section does not apply unless the exclusion, restriction or modification is limited to liability for:
 - (a) death; or
 - (b) a physical or mental injury of an individual (including the aggravation, acceleration or recurrence of such an injury of the individual); or
 - (c) the contraction, aggravation or acceleration of a disease of an individual; or
 - (d) the coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or State of affairs in relation to an individual:
 - (i) that is or may be harmful or disadvantageous to the individual or community; or
 - (ii) that may result in harm or disadvantage to the individual or community.
- (4) This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services.
- (5) The supplier's conduct is reckless conduct if the supplier:
 - (a) is aware, or should reasonably have been aware, of a significant risk that the conduct could result in personal injury to another person; and
 - (b) engages in the conduct despite the risk and without adequate justification.

There are many requirements to be satisfied before a service provider can rely upon this provision to give efficacy to its exclusion clauses.

5.1 Section 139A (1) ensures the usual rules regarding exclusion clauses apply

At common law, the principle of *caveat emptor* means that as a general rule, parties to a contract can agree to exclude or limit liability for loss pursuant to the terms of the contract. For the exclusion or limitation clause to be relied upon, it must be properly incorporated in the contract. Once incorporated, to be effective the clause must, on its proper construction, actually apply to the situation in question. Section 139A can only operate if the exclusion is in fact a term of the contract; and implicitly the exclusion clause can only take effect if by its terms it applies to the facts of the case.

Defendants seeking to rely on exclusions or limitations often display a misplaced optimism that their standard clauses form part of the contract.⁵⁷ For example, in *Nair-Smith v Perisher Blue Pty Ltd* the parties had not addressed whether the conditions printed in approx. 1 mm print on the reverse of ski lift ticket had contractual effect. The parties also proceeded on the assumption that the terms printed on the sign at the ticket window for the ski lift were part of the contract. The Judge was not satisfied that either the ticket terms or the sign had contractual effect.⁵⁸

Even if the clauses are incorporated in the contract, they must also be engaged on the particular facts of the case. In *Insight*, the High Court interpreted the exclusion clause as inapplicable on the facts of the case. The contract provided:

⁵⁷ For cases dealing with waivers and exclusions in contracts for recreational activities under the CLA, see *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200; and *Alameddine v Glenworthy Valley Horse Riding Pty Ltd* [2015] NSWCA 219.

⁵⁸ [86]. His Honour dealt with the clauses as if they were contractual, so as to show that they did not assist the Defendant.

Where the passenger occupies a motorcoach seat fitted with a safety belt, neither the operators nor their agents.... Will be liable for any injury... or for any damages or claims whatsoever arising from any accident or incident, if the safety belt is not being worn at the time of such accident or incident.

The plaintiff was injured when she stood from her seat to retrieve an item from the overhead locker on a moving bus. The High Court concluded the exclusion clause did not apply in those circumstances as she was not ‘occupying’ a seat at the time of the accident. The terms did not require the passengers to remain seated at all times.⁵⁹

5.2 Section 139A (2) CCA ‘contract for the supply of recreational services’ according to the Consumer Law

- (1) A term of a contract for the supply of recreational services to a consumer by a person is not void under section 64....
- (2) Recreational services are services that consist of participation in:
 - (a) a sporting activity or a similar leisure time pursuit; or
 - (b) any other activity that:
 - (i) involves a significant degree of physical exertion or physical risk; and
 - (ii) is undertaken for the purposes of recreation, enjoyment or leisure.

In order to take advantage of the immunity from the consequences of s 64 ACL, there must be a term of a contract for the supply of ‘recreational services.’

It is clear the *TPA/Consumer Law* wording is narrower than the definitions of recreational services caught by the State CLA provisions.⁶⁰ The NSW Court of Appeal considered that a contract for tourist activities would satisfy the CLA definition of recreational services, although it fell outside the Consumer Law definition. The awkwardness of the wording in the definition of ‘recreational services’ in *Consumer Law* has been discussed by several courts.⁶¹

Nair-Smith v Perisher Blue Pty Ltd also considered the definition of ‘recreational services’ found in s 68B TPA, the former iteration of s 139A.⁶² Based on the wording of the ski lift pass purchased by the plaintiff, the trial judge found that the contract was for the service of being transported up the ski slopes or between ski slopes.⁶³ It was not a contract for ‘participation in a sporting activity or similar leisure-time pursuit’, and therefore the trial judge held that s 68B was not applicable.⁶⁴ This was a narrow reading of the contract, and the defendant appealed on this and other grounds

Before the Perisher Blue appeal was heard, another appeal on this matter was before the NSW Court of Appeal. In *Motorcycling Events*, Court of Appeal appeared to take a broader view. The court found that the **nature** of the activity (‘sporting or other leisuretime pursuit’) and, for sub-s (b), the **purpose** of the activity (‘for the purpose of recreation, enjoyment or leisure’) were relevant to the fulfilment of the definition. The purpose of the activity was to be assessed objectively, taking into account the subjective intention of the participant.⁶⁵ In that case, a course teaching advanced motorcycling skills was held to be a recreational service because the injured participant had undertaken the course to increase his enjoyment of motorcycling which was for him a recreational activity. It would seem to follow, therefore, that if the participant’s objective in participating in the course was to improve his motorcycling skills so as to make him a more defensive driver, that there may not have been a contract for recreational services within the scope of s 68B.

⁵⁹ [38] – [39]. The discussion was obiter, as the court had already decided the provision could not apply to services provided outside of NSW and that the CLA provision permitting exclusion of liability was not uplifted by s 275 *Consumer Law*. See also the recent decision of the NSW Court of Appeal in *Alameddine v Glenworthy Valley Horse Riding Pty Ltd* [2015] NSWCA 219 where it was held the exclusion clause was ineffective on the facts of the case, at [54] – [57].

⁶⁰ The High Court also acknowledged this in *Insight* that the TPA wording (in this respect identical to the CCA wording) is narrower than the CLA definitions of recreational services (at [25]) and this was explicitly noted by the New South Wales Court of Appeal both in *Insight* [2010] NSWCA 137, and in *Motorcycling Events* [2013] NSWCA 361 (Gleeson JA (with whom the other members of the Court agreed) at [127].

⁶¹ *Motorcycling* [2013] NSWCA 361; 303 ALR 583 at [129]. *Nair-Smith*, [105].

⁶² [2013] NSWSC 727.

⁶³ [101].

⁶⁴ [106].

⁶⁵ *Motorcycling*, [134] (Gleeson JA delivering the leading judgment).

After the Court of Appeal decided *Motocycling Events* came the *Perisher Blue* appeal. The appeal was upheld on the basis that while Perisher Blue had been negligent, the injured claimant had not demonstrated the causal link between the negligence and the accident.⁶⁶ Accordingly, questions as to the TPA and ‘recreational services’ were discussed in obiter only. The court concluded that the ski lift contract had been too narrowly characterised by the trial judge. The ‘purpose and object’ of the transaction was to facilitate resort skiing, which included the provision of the ski lift services. Therefore the services provided did fall within the definition of ‘recreational services’.⁶⁷ Nonetheless the Court of Appeal found that Perisher Blue would not have been entitled to rely on the exemption clause because it did not satisfy s 68B(3). The clause excluded property damage as well as personal injury claims.

For cruise ship passenger contracts the Consumer Law definition of ‘recreational services’ poses at least two questions:

5.2.1 Can an entire contract for a cruise be a ‘contract for recreational services’ under s 139A?⁶⁸

It is doubtful that a cruise contract in its entirety could be construed as a contract for the provision of recreational services as defined in the CCA. The provision speaks of a sporting activity ‘or similar leisuretime pursuit’. The words ‘similar leisuretime pursuit’ must be interpreted *ejusdem generis*. While cruises offer sporting activities, they are hardly compulsory; and many people on board cruises undertake nothing more strenuous than a gentle stroll to the buffet or bar. Subsection (2)(b) of the definition requires that the activity needs to involve significant physical exertion or risk. Therefore, as many aspects of a cruise that fall outside of the definition of recreational services, the guarantee of due care and skill will not be excludable for every aspect of the cruise contract or for the cruise in its entirety. Further, to accept it applied to whole contract would be to allow exceptions for such things as failure to exercise good seamanship, or failure to supply uncontaminated food, and it would be unlikely that a court would hold that this satisfies the intent of the provision.⁶⁹

It follows, therefore, that a cruise ship provider could not exclude liability arising from negligence in the navigation of the ship.⁷⁰

This view takes support from the judgment of the NSW Court of Appeal in *Insight*. Spigelman CJ stated ‘s 68B had no application to the type of tourist travel occurring in this case. It was simply not engaged... it was common ground in this Court that it was irrelevant.’⁷¹ (In contrast, the NSW Court of Appeal found the entire service would have satisfied the CLA definition).⁷²

5.2.2 As part of a cruise contract will be for recreational services, can s 139A apply to terms relating to those services?

There are a range of activities offered on board ships would fall within the CCA definition of ‘recreational services’. Optional activities on board ships, such as rock climbing, ice skating, ziplining, ‘flowrider’ surfing machines, waterslides and the like would be considered as ‘sporting activities’ or ‘similar leisuretime pursuits’ with ‘significant degree of physical exertion or physical risk’. Adventure based activities such as zodiac expeditions from the cruise ship to view glaciers would also qualify. There are some that will fall into the grey area; for example, dancing, and fitness classes. It is not clear whether the courts will regard these types of activities as being ‘recreational services’ but it seems likely that they are ‘a sporting activity or a similar leisure time

⁶⁶ The entire case turned on a very small point. The Court of Appeal upheld the finding of negligence but on different grounds. The evidence given at trial concerning causation had not been directed at this ground, and therefore with no evidence that it was the actual act of negligence found by the court of appeal that caused the loss, the claimant’s claim failed. An application for special leave to the High Court was refused in October 2015.

⁶⁷ [201]. However, the clauses otherwise didn’t satisfy ss 68A or 68B.

⁶⁸ Note that under the CLA provisions of some States, such as the NSW provision s 5N CLA scrutinized in *Insight*, the provision may well be sufficiently broad to capture an entire cruise contract as a contract for recreational services. Again, this can only be of relevance where a claim is brought in that State, where the Commonwealth *Consumer Law* does not apply because either the provider is not a corporation or the contract does not have Australian law as the objective proper law. The argument would also require *Insight*’s extraterritorial application hurdle to be overcome.

⁶⁹ In fact, if a cruise ship operator were to draft its terms attempting to claim that an entire contract was one for recreational services, it might leave itself exposed to an argument that it is either acting unconscionably, engaging in misleading and deceptive conduct, or that the term of the contract was unfair.

⁷⁰ It is worth noting that even under the State based CLAs, certain forms of negligence that would also involve a breach of a statutory provision would mean that the provider would be unable to exclude liability in any event; see for example CLA (NSW) s 5N(6). Negligent navigation in breach of the Collision Regulations, and failure to adhere to health regulations in the preparation of food would be examples.

⁷¹ [21].

⁷² [94] (Basten J), [63] (Spigelman CJ).

pursuit'. Many cruise ships also facilitate activities in port but disclaim liability arising from them. If those activities are of a kind that falls within the recreational services definition, such as paragliding, spearfishing or water-skiing, an appropriately drafted and incorporated exclusion or limitation clause could effectively restrict liability for personal injury arising from that accident under Australian law. However, sightseeing tours or walking tours are unlikely to fall within s 139A.

It is clear that the wording of the exclusion needs to be effective to exclude liability for the injuries sustained, and validly incorporated in the contract. However, what is uncertain is whether a cruise contract may validate its exclusion of liability for its recreational services under s 139A for only that part of the contract for the supply of recreational services. Clearly a cruise contract consists of many elements and not all of them relate to recreational services. It is at least conceivable that a court could find that, as the cruise contract taken as a whole is not such a contract for recreational services then s 139A can have no application. The provision could have been drafted as 'contract for or including recreational services'.⁷³

If the carrier cannot trigger s 139A for part of its contract only, then the carrier may need to frame its exclusion as part of a freestanding contract for that recreational service: a much more onerous and inefficient solution for carriers. The contractual status of a waiver in an unsigned document, or a notice on display (a 'risk warning'), is questionable – and even if it is contractual in nature, the question then becomes whether sufficient steps have been taken to bring the notice to the attention of the passenger.⁷⁴

5.3 Section 139A(3) Exclusion clause must only relate to personal injury or death

Subsection 3 reads (emphasis added):

- (3) This section does **not apply unless** the exclusion, restriction or modification is **limited to** liability for:
 - (a) death; or
 - (b) a physical or mental injury of an individual...or
 - (c) the contraction, aggravation or acceleration of a disease of an individual; or
 - (d) the coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or state of affairs in relation to an individual:
 - (i) *that is or may be harmful or disadvantageous to the individual or community; or*
 - (ii) *that may result in harm or disadvantage to the individual or community.*

The wording of s 139A(3) is slightly different to the previous provision, s 68B. Section 68B provided:

- (1) A term of a contract for the supply by a corporation of recreational services is not void under section 68 by reason only that the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:
 - (a) the application of section 74 to the supply of the recreational services under the contract; or
 - (b) the exercise of a right conferred by section 74 in relation to the supply of the recreational services under the contract; or
 - (c) any liability of the corporation for a breach of a warranty implied by section 74 in relation to the supply of the recreational services under the contract;

so long as:

- (d) the exclusion, restriction or modification is limited to liability for death or personal injury; and
- (e) the contract was entered into after the commencement of this section. (section goes on to define personal injury).

The qualifying words that trigger s 68B were considered by the NSW Court of Appeal in *Motorcycling Events*.⁷⁵ The Court of Appeal was of the view that a clause that excluded anything other than liability for personal injury or death would not satisfy the provision. Gleeson JA, with whom the other judges agreed, stated:

⁷³ There is a fascinating question about the appropriate interpretation of this provision. As it is an exception to liability to a consumer, one might think it should be interpreted narrowly given the overall purpose of the *Consumer Law*. On the other hand, the exception was introduced with its own particular purpose; to permit those who supply recreational services as defined to limit modify or exclude their liability to their customers and it could be argued this should guide the interpretation of the section.

⁷⁴ See for example *Alameddine v Glenworthy Valley Horse Riding Pty Ltd* [2015] NSWCA 219, [52]. Although concerned with the CLA provision concerning contractual waivers, it is submitted that the case reflects the broader common law as regards incorporation and interpretation of exclusion clauses.

⁷⁵ [2013] NSWCA 361; 303 ALR 583.

The words “so long as” are words of limitation which impose a requirement that the relevant term of the contract “is limited to”, that is, do no more than exclude restrict or modify liability for death or injury. If the qualification of the general avoiding effect of s 68(1) which s 68B(1) provides for was intended to have a broader operation... then the words “so long as” would be most inappropriate to achieve that result. The language appropriate to achieve such a wider excision from the operation of s 68(1) would have been words such as “insofar as” or “to the extent that” in the place of the words “so long as”.⁷⁶

The appellant’s clauses⁷⁷ purported to apply to injury, death and property damage. They were held not to be saved by s 68B because they were not limited to injury and death, and therefore the clauses were rendered void by s 68.⁷⁸

The same reasoning found favour with Justice Beech-Jones in *Nair Smith v Perisher Blue Pty Ltd*,⁷⁹ and was approved, albeit in obiter, on appeal.⁸⁰

The words ‘so long as’ did not survive the transition to s 139A. Instead, the critical part reads ‘[t]his section does **not apply unless** the exclusion, restriction or modification is limited to liability for... death...personal injury...’. It is submitted that the effect of the wording is unchanged. The section will not apply (and therefore a clause will be void by reason of s 64 unless the clause is limited to liability for death or personal injury as defined. Despite the legislative drafters reworking this phrase, it appears to achieve the same purpose as the previous provision. Had the drafters intended the provision to operate more broadly, this certainly could have been achieved. Therefore it is submitted that the reasoning of the New South Wales Court of Appeal in *Motorcycling Events* remains valid for s 139A, and this has been recently confirmed by the NSW Court of Appeal in *Alameddine v Glenworthy Valley Horse Riding Pty Ltd*.⁸¹

Passenger ship operators, along with other recreational providers, must ensure their provisions excluding or limiting liability for personal injury or death stand apart from other provisions that seek to exclude or limit liability for property damage or other claims.

5.4 Section 139A(4) reckless conduct causing significant personal injury.

- (4) This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services. (emphasis added)

Reckless conduct is defined in sub-s 5.

As noted by Dominic Villa in his annotation of the CLA NSW,⁸² this provision can be read two ways:

- If a clause has been drafted such that it would protect against liability for reckless conduct, then it will not be protected under s 139A.
- A clause will not apply to exclude restrict or modify liability where a person has sustained significant personal injury as a result of reckless conduct by the supplier.

The former is much wider than the latter, as it would have the effect of striking down a clause that would potentially have that effect, regardless of whether there was reckless conduct or not. As Dominic Villa suggests,⁸³ the latter interpretation appears to align best with the purpose of the section; and this interpretation gives the definition of reckless conduct in s 5 some work to do.

⁷⁶ [116] – [117].

⁷⁷ See [67].

⁷⁸ The court held it was unnecessary to decide whether the words of s 68 permitted a clause to be void only to the extent of the inconsistency with s 74(1) such that other parts of the clause – such as exclusion of liability over *negligence*- might remain valid. Justice Beech-Jones had been in favour of this construction of s 68(1) in *Nair Smith v Perisher Blue Pty Ltd*; [93].

⁷⁹ See [113], [115] – [116].

⁸⁰ [2015] NSWCA 90; (2015) ALR 235, [216].

⁸¹ [2015] NSWCA 219.

⁸² Dominic Villa, *Annotated Civil Liability Act 2002 (NSW)* (Lawbook Co, 2nd ed, 2012) 204.

⁸³ Ibid 204.

5.5 Conclusion on contractual exclusions and s 139A

It appears that s 139A CCA might be effectively harnessed to permit the operation of exclusion clauses for those specific activities engaged in by passengers that might constitute recreational services. However the case law tells us that it is a rare instance that such a clause will be:

- incorporated;
- worded such that it addresses the particular circumstances of the plaintiff's accident; and
- comply with the rigours of the TPA/CCA without falling foul of its other provisions.

The clauses need to be drafted with forensic accuracy, paying close attention to the pitfalls that befell such provisions in *Insight*, *Motorcycling Events*, *Nair-Smith* and *Alameddine*.

6 Concluding comments

In summary, a claim brought in Australia by a passenger claiming damages for injuries sustained on an international voyage is dealt with by a mix of common law and federal and State statutes. The interaction of the CLAs with the consumer protection regime in the context of personal injury claims can best be described as labyrinthine. The laws are difficult to navigate and their application is not straightforward, particularly when sought to be applied to contracts that may not have been entered into in Australia and in many cases are performed entirely or significantly outside Australian territory.

A summary of the position is as follows:

- The Commonwealth iteration of the *Consumer Law*, and its enabling Act the *Competition and Consumer Act*, applies to all corporations.⁸⁴
- The contractual duty to exercise due care and skill at common law is now enshrined as a statutory guarantee in the *Consumer Law*, applicable via Commonwealth and State legislation.
- The Commonwealth iteration of the *Consumer Law* States that duty to render services with due care and skill will apply where the objective proper law of the contract is that of any State or Territory in Australia.⁸⁵ It will probably be extended to conduct outside Australia by Australian corporations, those carrying on business in Australia, Australian citizens and residents.⁸⁶ The application of State iterations is also worded broadly, but uses a different trigger.⁸⁷
- The assessment of liability for the injury (including such matters as contributory negligence, and proportionate liability), together with the calculation of damages, would appear to be determined in accordance with the applicable State CLA provisions which are 'surrogate federal laws' for that purpose, pursuant to s 275 CCA. (A separate set of questions arise where the harm has been suffered outside Australia).
- The extent to which s 275 will 'pick up and apply' state based civil liability laws to s 60 statutory guarantee claims is far from certain.

The prevailing view is that the CLA provisions providing 'no duty' are probably not 'surrogate federal laws'.

- The CLA provisions permitting contractual exclusions and waivers for injuries sustained during recreational activities are not 'federal surrogate laws': High Court in *Insight*. Therefore, these State provisions are inconsistent with the CCA/*Consumer Law* (Cth) and are inapplicable to the statutory guarantees. The NSW Court of Appeal has ruled that 'risk warning' provisions will suffer the same fate.

⁸⁴ As well as some others caught by the operation of the Act, such as those using Australia post or other telecommunications.

⁸⁵ TPA, s 67; *Consumer Law*, s 67. The proper law must be expressed as that of a particular State or Territory. This choice of words is because there is no such thing as 'Australian law' in the same way there is no such thing as the law of the United Kingdom.

⁸⁶ CCA, s 5.

⁸⁷ See 1.3.5 above dealing with extraterritorial application of State based *Consumer Laws*.

- For corporations, their waivers must therefore satisfy s 139A of the CCA to be valid. The CCA will apply to a contract the applicable law of which is a place in Australia, even if the services are supplied outside Australia.⁸⁸ Notably, to rely on the provision, the clause must be properly incorporated and effective to exclude the actual event; the clause can only exclude liability for injury and death, the contract has to be one for ‘recreational services’ as (more narrowly) defined in the CCA, and the reckless conduct qualification must not be triggered. There is a risk that the provision may be interpreted as operating only if the entire contract is for ‘recreational services’.

For unincorporated service providers, their waivers need to comply with the requirements of the *State Consumer Law*.⁸⁹

- The State CLA provisions are not uniform as between the States. We have moved from a uniform Australian common law of negligence to fractured State and territory based laws. Intrastate conflicts of law issues are inevitable.⁹⁰ The outcomes of cases could be different depending on where the litigation is held. (Cruise ship operators tend to manage this risk by identifying the law of a particular state, usually NSW, as the law of the contract.) There may also be territorial limitations on the State CLA provisions that are particularly relevant for passenger claims where the harm has occurred outside Australia. The recreational service provisions in particular will only apply to services supplied within the State unless there is a clear statement of extraterritorial application.

These two papers have only considered the operation of the *Consumer Law* provisions and the CLA regimes applicable to passenger claims under Australian law. Even in that limited respect, it is clear that the Australian law applicable to personal injuries sustained by breach of contract, generally, and passenger claims in particular, is a complex web that belies the consumer flavour of such claims. There is a general review of the *Australian Consumer Law* due to take place in 2016, and one can only hope that the review considers the troublesome interactions between the ACL and the state CLAs as outlined in this paper.

For cruise ship operators and passengers, this is only part of the story. Beyond the ambit of this paper are other difficulties with Australian law that compound the complexity for those on both sides of a passenger claim. For example:

- The need for the passenger to establish, and the carrier to refute a breach of the statutory guarantee even in the event of a maritime accident (comparing unfavourably with the position under the 2002 *Athens Convention* that renders shipowners strictly liable for claims arising from a shipping incident)⁹¹;
- The unknown ambit and effect of the *Consumer Law* unfair terms regime on cruise ship conditions. For example, will a truncated time bar be ‘unfair’? Will the contractual imposition of 1974 Athens quantum limits be ‘unfair’?⁹² Could an Australian choice of law clause be ‘unfair’ if the 2002 *Athens Convention* would otherwise apply (ie if a passenger embarks on a cruise in an Athens signatory State)? Are clauses stripping passengers of a class action process ‘unfair’? Will passage conditions that misrepresent the entitlement to exclude liability for personal injury be considered unfair, and asserting a right to rely on such terms misleading and deceptive?⁹³ Will an exclusive jurisdiction clause in favour of courts in Florida be unfair, where an Australian passenger has contracted for a 3 day cruise to nowhere from an Australian port?⁹⁴

⁸⁸ If the contract is governed by the law of another country, it may still be subject to the *State Consumer Law* and CLA. See the discussion at 1 above.

⁸⁹ Matters of interstate conflict of laws are not discussed in this paper. However the *Jurisdiction of Courts (Cross-Vesting) Act 1978* (Cth) s 5(2) permits the transfer of proceedings interstate to a more appropriate court. An application based on an exclusive jurisdiction clause contained in standard terms will be relevant but will carry little weight: *Correa v Carnival plc* [2015] VSC 718.

⁹⁰ Martin Davies, ‘Choice of law after the Civil Liability Legislation’ (2008) 16 *Torts Law Journal* 104, 119.

⁹¹ ‘Hotel risks’ are still subject to the usual burden of proof under Athens

⁹² Such clauses may well fall foul of s 64 ACL in any event, at least in relation to a maritime accident.

⁹³ See, eg, *eBay International AG v Creative Festival* [2006] FCA 1768. The eBay case also provides a sobering warning. Justice Rares held that asserting by way of the website a right to rely upon a term to cancel tickets obtained from scalpers, when that term was not actually part of the contract, was itself misleading conduct in breach of s 52 TPA (s 18 ACL). Asserting that a contractual clause operates to exclude or limit liability when it cannot have that effect under Australian law would also be contrary to s 29(m). Passenger ship operators would do well to check their own practices both on websites and brochures to ensure they are not asserting rights they do not have.

⁹⁴ It is submitted this would constitute a relatively clear-cut case: yet a consumer, on reading such a term, may not realise that it is likely to be struck down. See the comments made in relation to the *eBay* case, *ibid*.

- The apparent requirement that passenger claims be commenced in admiralty and therefore before a court rather than a consumer tribunal.⁹⁵

Overall, the position of cruise ship passengers under Australian law is in the best interests of no-one save possibly the lawyers, although they will strain to fulfil their duty to establish the true state of their client's legal position no matter which side they represent. All but the most steel-willed (and deep pocketed) consumer will be disheartened upon being advised of the many variables and uncertainties. The ship operator, running a commercial venture, is similarly disadvantaged by the lack of business certainty and expensive defence costs. This scenario can lead to paying out unworthy claims or the dragging out of those worthy of quick settlement.

Although the quantum of claims under the Australian consumer law may appear uncapped, they are in fact constrained in real terms by the Civil Liability Acts. Further, it is submitted that the opacity of Australian law renders it less protective of a passenger's claim for personal injuries than the *2002 Athens Convention*. Space does not permit a discussion of the benefits and drawbacks of the *2002 Athens Convention*, so only a few observations will be made. Whatever Australia's reasons for not signing the original *1974 Athens Convention*, the small numbers of passengers carried on international voyages by sea from Australian ports in the latter part of last century meant it was hardly a legislative priority. Certainly by the time *1974 Athens Convention* entered into force, its limits were widely regarded as far too low; indeed, the UK unilaterally increased its limits in 1987 and 1999.⁹⁶ However the *2002 Protocol*, known as *2002 Athens Convention*, has been in force since 2014. The *2002 Athens Convention* still permits capping of claims, but the limit is much more generous: up to 400,000 SDR per passenger per distinct occasion, if negligence can be proven. This amounts to approximately AUD \$750,000.⁹⁷ The limit does not include interest or legal costs.⁹⁸ This limit means few claims will be capped. Under the *2002 Athens Convention* it is open to signatory states to set higher quantum limits, or impose no caps on personal injury claims.⁹⁹ Importantly for passengers:

- the Convention provides a regime for assessing liability of a carrier to passengers;
- the carrier will be strictly liable for injuries sustained as a result of a shipping incident such as a shipwreck, collision, fire or stranding up to the amount of 250,000 SDRs (approximately AUD \$484,000) with up to 400,000 SDR available if negligence can be proven;
- the compulsory insurance regime, with direct recourse to the insurer, provides protection against the insolvency of a cruise ship operator up to 250,000 SDR per passenger, and the passenger has direct recourse against the insurer. ;
- the carrier cannot contract out of the Convention, and choice of law issues are virtually eliminated;¹⁰⁰
- the Convention eliminates jurisdictional disputes by nominating courts of competent jurisdiction.

If Australia chose to implement the *2002 Athens Convention*, the enabling Act would need to explicitly outline its interaction with the CLAs. It is submitted that the liability regime of the *2002 Athens Convention* should supplant the parts of the CLA dealing with modifying or excising liability.

One critical question is whether the state based CLAs should be permitted to apply to the quantum of claims brought under the *2002 Athens Convention*. Given that the *2002 Athens Convention* itself contains caps on liability, the passenger claim should not be subject to multiple limits each further reducing the quantum of the claim. It is submitted that it is inappropriate to permit passenger claims to be capped twice (or possibly even three times).¹⁰¹

⁹⁵ See *Morland v Carnival Pty Ltd t/as P&O Cruises ("Pacific Jewel")* unreported GEN 13/13604 26 July 2013 (Member Levingston).

⁹⁶ From the convention limit of 46,666 SDR to 100,000 SDR with effect from 1 June 1987: *The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1987* (SI 1987/855), then to 300,000 SDR per passenger with effect from 1 January 1999: *The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998* (SI1998/2917). The limit increases could only take effect for UK flagged carriers. Under the *2002 Athens Convention*, state parties can raise the limits applicable for its territory, regardless of the flag state of the carrier: Article 7.2.

⁹⁷ As at 21 December 2015.

⁹⁸ Art 10.

⁹⁹ Article 7.2.

¹⁰⁰ Article 18.

¹⁰¹ If the total of all claims by passengers was sufficient to invoke the limits set out in the *Limitation of Liability for Maritime Claims Act 1989* (Cth) (LLMCA).

Granted, all of this, and more, would need careful consideration.¹⁰² However it is submitted that implementation of the *2002 Athens Convention*, in some form or another, could provide a much clearer and more certain framework for these claims, benefitting both Australian passengers and cruise ship operators alike.¹⁰³ One only needs to look at the dearth of case law on passenger claims in England to see that the regime leads to a reduction in litigation. There are also the advantages of a semblance of international consistency: in particular, the case law of other Convention countries could be considered in aid of its interpretation. This would lower legal costs for all concerned.

Perhaps most importantly, implementation of Athens would give Australian passengers direct recourse against insurers if the cruise ship operators were unable to pay claims. Under the *2002 Athens Convention*, the insurer is required to use sums provided by insurance ‘exclusively for the satisfaction of claims under this Convention’.¹⁰⁴ Australian passengers are without a ‘financial lifeboat’.¹⁰⁵

With Australians so eager to embrace international carriage by sea, it is time our laws were designed to embrace it too.¹⁰⁶

¹⁰² Other aspects that would need to be considered include whether the Convention ought to apply to interstate and intrastate travel, to non-seagoing ships, whether the LLMCA limits would apply or ‘stand aside’ for the Athens limits or vice versa (Article 15.3bis, *Convention on Limitation of Liability for Maritime Claims* 1976 as amended by the 1996 Protocol) and whether the quantum limits for personal injury claims under Athens should be increased or removed as permitted by Article 7.

¹⁰³ Kate Lewins ‘Australian cruise passengers travel in legal equivalent of steerage – considering the merits of a passenger liability regime for Australia’ (2010) 38 *Australian Business Law Review* 127.

¹⁰⁴ Article 4bis 11.

¹⁰⁵ With acknowledgements to Professor Nick Gaskell who coined this term.

¹⁰⁶ Postscript: in May 2015 the Supreme Court of New South Wales heard the matter of *Moore v Scenic Tours Pty Ltd*. It is a class action brought by 1265 plaintiffs who claim the defendant did not deliver on the contractual promise to provide luxury river cruises during the floods in Europe in May-June 2013. The plaintiffs claim includes damages for disappointment and distress: another aspect of claims against carriers that falls outside the ambit of this paper but also presents challenges and uncertainties. The judgment in that case is keenly awaited.